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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

OREE BLAISE KHUFU, Plaintiff and Appellant, v. STEVEN TULSKY, et al, Defendants and Respondents.	A100532 (Marin County Super. Ct. No. CV013354)

I. INTRODUCTION

Appellant Oree Blaise Khufu appeals from a judgment entered against him and in favor of the respondents Steven and Jacqueline Tulsky after a jury returned a verdict in favor of those respondents in appellant's personal injury action against them. That action was based on an injury to appellant caused when he hit his head on a beam on respondents' property where he was temporarily employed as a landscape worker. Appellant's sole ground of appeal is that the trial court erred in allowing jurors who were employed on an hourly basis to be excused for economic hardship. We disagree with appellant's position and hence affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

On March 14, 2001, appellant was injured when he hit his head on a wooden beam supporting an overhang on respondents' garage. Appellant, who is six feet, eight inches tall, was descending steps (two at a time, he testified) leading to that garage, when he hit the beam, which was just under seven feet high. He allegedly injured his head and neck

as a result of the impact. Appellant, who had worked mainly as a sound engineer for different bands, was temporarily working on respondents' property as a landscape laborer for a landscaping business owned by his mother. On July 10, 2001, he sued respondents for general negligence and premises liability, alleging among other things that they had maintained a "dangerous condition" on their residential property in San Rafael.

After discovery was complete, the case went to judicial arbitration. On February 26, 2002,[1] the arbitrator decided in favor of respondents, but appellant requested a trial de novo. That trial commenced on August 21, 2002, before the Honorable Michael Dufficy.

After the prospective jurors were sworn, Judge Dufficy announced that he would be calling "several categories which are pretty standard hardship excuses . . . ." The first such category he recognized was "anybody here that is a full-time student." When one young San Francisco State student identified herself as such, stated that classes "are going to start next week," and agreed with the court that "it's important that [she] not miss them," she was excused.[2]

The same procedure was then followed with prospective jurors who had "trip[s] planned with reservations, nonrefundable plane tickets, and so forth." Five prospective jurors identified themselves, the destination and timing of their business trips, and were similarly excused.

Third, Judge Dufficy asked if the panel included "anyone who has a problem with securing daycare for small children, or a member of the family is dependent upon you for care . . . ?" Three such prospective jurors identified themselves and were excused for the reasons they individually presented to the court.

Fourth and finally, Judge Dufficy came to the category that is the basis for this appeal. He asked: "Is there anyone who works and is paid hourly that will not be reimbursed by their employer for being on jury duty?" Seventeen prospective jurors

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1 All further dates noted are in 2002.

2 "Excused" in the sense used herein means simply excused from this case; the "excused" panel members were all required to return to the jury panel assembly room for possible re-summoning at a later date.

apparently stood up and were then asked to line up for individual interrogation by the court. However, in the course of those interrogations, only nine of the 17 identified themselves as hourly paid workers or others who would not be paid if they did not come to work. Others among the 17 included (1) the Chief of Dermatology at a Kaiser hospital who would "have a hundred patients to cancel, plus I have people waiting for surgery," (2) a caretaker for five horses who had to be present to feed and care for them, (3) several self-employed individuals, (4) an architectural draftsman and designer who had "a presentation scheduled for Friday," etc. In any event, all 17 prospective jurors claiming employment-related hardships were individually questioned by the court and then excused.

During the course of this, appellant's counsel asked for a conference at the bench and, apparently, lodged a formal verbal objection to the court's excusing jurors because of job-related economic hardships. The following day, appellant filed a pleading entitled "Renewal of Plaintiff's Objection to Selection of Members of Jury," which both referred to the previous day's bench conference on the issue and reiterated that appellant objected to "the court's systematic exclusion from jury duty prospective jurors who were employed on an hourly basis or who worked for wages and stated that they would not be paid by their employer while they served on the jury." On August 26, the jury returned a verdict finding respondents not negligent. Judgment in their favor was entered the same day and appellant filed a timely notice of appeal on October 7.

III. DISCUSSION

Appellant contends that, in *Thiel v. Southern Pacific Co.* (1946) 328 U.S. 217 (*Thiel*), the United States Supreme Court precluded the method of jury selection that occurred here. In that case, the court overturned a jury verdict in favor of the defendant railroad in a personal injury action originally filed in California state court but removed on diversity grounds and ultimately tried in a California federal court. After demanding a jury trial, the plaintiff moved to strike the entire panel on the ground that it had been selected in a discriminatory manner. That motion, and his later motion to either set aside the verdict or for a new trial, were both denied and the judgment against him later

affirmed by the Ninth Circuit Court of Appeals. The Supreme Court granted certiorari on the limited question of whether the plaintiff's "motion to strike the jury panel was properly denied." (*Id*. at p. 220.) The court ruled that it was not because "[t]he undisputed evidence in this case demonstrates a failure to abide by the proper rules and principles of jury selection." (*Id.* at p. 221.)

That evidence consisted of uncontradicted testimony by both the clerk of the federal district court and its jury commissioner that they "deliberately and intentionally excluded from the jury lists all persons who work for a daily wage." (*Thiel*, *supra*, 328 U.S. at p. 221.) This was accomplished by, first, using a city directory as the source of prospective jurors and then deliberately not including in the list of prospective jurors anyone who the directory showed to have an occupation that normally involved daily wage compensation. (*Id.* at pp. 221-222.) The rationalization of this methodology was that "'those men came into court and offered that [financial hardship] as an excuse, and the judge usually let them go.'" (*Id.* at p. 222.)

The court roundly rejected this practice, stating: "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. [Citations.] This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political, and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual, rather than a group or class, matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (*Thiel*, *supra*, 328 U.S. at p. 220.) The court went on to state that "the general principles underlying proper jury selection clearly outlaw the exclusion practiced on this instance. Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3

a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words, the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror. Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature, we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do." (*Id.* at pp. 223-224, fns. omitted.)[3]

However, in the course of so holding, the *Thiel* court made clear that it was *not* preempting the well-recognized right of a trial judge to excuse jurors for economic hardship, stating: "It is clear that a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship. But that fact cannot support the complete exclusion of all daily wage earners regardless of whether there is actual hardship involved. Here, there was no effort, no intention, to determine in advance which individual members of the daily wage earning class would suffer an undue hardship by serving on a jury at the rate of $4 a day. All were systematically and automatically excluded." (*Thiel, supra,* 328 U.S. at p. 224, fn. omitted.)

Our own Supreme Court has explicitly recognized the distinction between a *blanket exclusion* of wage-earning jurors and *excusing individual prospective jurors* who assert that serving on a jury constitutes an economic hardship. In *People v. Milan* (1973) 9 Cal.3d 185, 195-196 (*Milan*), the court considered the contention of a convicted murderer that his conviction should be reversed because the jury commissioner had

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[3] The principle of *Thiel* is reflected in our own Code of Civil Procedure which precludes exemption from jury duty because, among other reasons, of "economic status." (Code Civ. Proc., § 204, subd. (a).)

excused on hardship grounds prospective jurors who individually filled out affidavits to the effect that it would an economic hardship for them to serve and receive only $5 a day. It wrote: "Defendant argued in the trial court that few can live on $5 a day without outside income and that excusing persons for whom it would be a hardship to serve for that amount left a jury composed of the wealthy, the retired, housewives, and those covered by contracts providing for payment during jury service. [¶] The trial court denied the challenge, and defendant argues on appeal that the court thereby erred. He cites *Thiel v. Southern Pacific Co*., 328 U.S. 217, but his reliance upon that case is misplaced. *Thiel* involved a federal jury from which daily wage earners were intentionally and systematically excluded, and the United States Supreme Court held that in the exercise of its power of supervision over the administration of justice in federal courts the defendant's motion to strike the jury panel should have been granted. In the instant case persons were excused from serving on the ground of economic hardship and not because they were daily wage earners. *Thiel* expressly recognized that 'a federal judge would be justified in excusing a daily wage earner for whom jury service would entail an undue financial hardship.' [Citation.] Similarly, it is permissible for a jury commissioner to excuse a prospective juror on the ground of such hardship. [Citations.] The court did not err in denying defendant's challenge. [Citation.]" (*Milan, supra,* 9 Cal.3d at p. 196.)

The court expanded upon this theme most recently in *People v. Harris* (1989) 47 Cal.3d 1047 (*Harris*), another appeal by a defendant convicted of first-degree murder who claimed that excusing prospective jurors for financial hardship denied him a representative cross-section of the community. The court first noted that "notwithstanding the efforts of the court to avoid excusing jurors on the grounds of hardship when employers were unwilling to continue payment of salaries for the protracted period of a capital case, many jurors were excused for financial hardship, or because their absence from a job would cause serious hardship to an employer." (*Id*. at p. 1077). It ruled, however, that this fact was not dispositive, explaining: "The record does

not establish, however, that any cognizable class of jurors received excuses on grounds of financial hardship." (*Ibid*.)

The defendant in *Harris* conceded that the court's holding in *Milan* undermined his claim, but argued that that decision should be reconsidered due to the facts in his case: "Defendant notes that 28 percent of the prospective jurors received hardship excuses in this case, and that at the time jury selection actually began less than half of the panel remained. On this basis he argues that it is clear that the 'demographic balance' of the group from which the jury was selected had been upset." (*Harris, supra,* 47 Cal.3d at p. 1077.)

The court did not agree: "Something more than speculation is required, however, to establish the denial of the claimed right. In order to establish underrepresentation, and thus denial of an impartial jury drawn from a fair cross-section of the community, a defendant must make a prima facie showing: '(1) that the group alleged to be excluded is a 'distinctive, group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.' [Citation.] If the prima facie showing is made, the burden shifts to the People to rebut that showing. [¶] A 'cognizable group' for analytical purposes is one whose members are distinctive in that they share a common perspective arising from their life experiences in the group, a perspective gained because they are members of that group and one that cannot be properly represented by jurors who are not members of the group. [Citations.] Only when a defendant demonstrates a significant disparity between the demographics of the panel or venire from which jurors are to be selected and that of the community does the question of whether the disparity results from systematic exclusion arise. [Citation.] [¶] Defendant's claim fails on all grounds. He has not established that the persons excused on hardship grounds in this case constitute a cognizable class. He suggests that the resulting panel consisted only of persons who did not need employment, or whose employers continued their salaries, but the record confirms neither this claim nor the

implicit assertion that those persons who were excused constitute a cognizable class." (*Harris*, *supra*, 47 Cal.3d at pp. 1077-1078, fns. omitted; see also, to the same effect, *People v. Johnson* (1989) 47 Cal.3d 1194, 1214; *People v. Cooper* (1991) 53 Cal.3d 771, 808.)

Similarly here, the losing defendant has failed to show the exclusion of a "cognizable class." First of all, the prospective jurors who were excused in this case did not just fill out a form affidavit, as was the case in *Milan.* They were, rather, all individually interrogated by Judge Dufficy. Secondly, the trial court recognized that are various and sundry types of "hardship," some economic and some not.[4] Thus, before he even got to employment-related issues, Judge Dufficy excused a college student who was about to start classes, five individuals about to embark on business trips or other travel for which pre-paid tickets and the like had been secured, and three individuals who had family-care problems. Only then did he call for, and separately interview, the 17 prospective jurors who claimed employment-related problems. And even then, as noted above, only about half of those 17 asserted hardships because of being wage earners or otherwise hourly employed. The other half were self-employed or with significant supervisorial responsibilities, scheduling problems, or the like. In short, if any generalization can be applied to the 17 excused in the fourth and final "hardship" category considered by Judge Dufficy it would be that they were just individuals with various employment-related problems. The whole process never amounted, even remotely, to the sort of "systematic exclusion" prohibited by *Thiel*.

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4 Our Code of Civil Procedure permits an eligible person to be excused from jury duty "only for undue hardship, upon themselves or upon the public, as defined by the Judicial Council." (Code Civ. Proc., § 204, subd. (b).) The Judicial Council has promulgated a lengthy rule setting forth seven different sorts of "hardship," one of which is whether the prospective juror would, if chosen to sit, "bear an extreme financial burden" considering his or her household income, the availability of income reimbursement, the expected length of jury service, and the impact of that service on the juror's ability to support himself or herself and his or her dependents. (See Cal. Rules of Court, rule 860 (d)(3).)

At oral argument, appellant's counsel argued that this court should require a trial court to implement and apply the "hardship" tests in rule 860 (d) of the California Rules of Court via detailed and individualized inquiries. For example, he argued, a trial court should not excuse a juror just because the latter states that he or she is employed on an hourly basis, but must both consider the likely length of the impending trial and inquire into the prospective juror's other economic circumstances, e.g., whether another member of the household has sufficient income, etc. We respectfully decline to intrude that far into a matter which is, concededly, very much a matter of a trial court's discretion. (See, e.g., *People v. Wheeler* (1978) 22 Cal.3d 258, 273; *People v. Basuta* (2001) 94 Cal.App.4th 370, 396.) If such a requirement obtains with respect to employment-related hardship, then it must similarly apply to representations concerning business travel, "prepaid" vacation tickets, child-care, and the like. The additional court time and other complications this could cause trial courts would obviously be considerable. Certainly a blanket deferral of jury service to a given category of prospective jurors without some individualized inquiry by a commissioner or judge is inappropriate. We will not try to define what the minimum amount of that inquiry is, but it was clearly undertaken by Judge Dufficy here.

Finally, appellant has simply not demonstrated that the result of the various excuses given the various hardship claimants created a significant difference between the jury empanelled and the Marin community. True, several hourly-paid persons were excused, but so were several others who were clearly either supervisorial or self-employed, as well as five who had either business or personal travel plans.

There is no showing of any abuse of discretion by the trial court here.

IV. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.